IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-705

WASHINGTON REEF NET OWNERS ASSOCIATION,
Petitioner

v.

UNITED STATES OF AMERICA, *et. al.*,
Respondents.

Petition of Washington Reef Net Owners Association
For a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

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Petitioners, Washington Reef Net Owners Association, respectfully request that a Writ of Certiorari be issued from the United States Supreme Court to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered June 4, 1975, and the order denying application for rehearing en banc entered by said court on July 23, 1975.

OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court are included in the appendix attached to the petition previously filed with this Court by the petitioner State of Washington and they are herewith, by this reference, included herein.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 4, 1975. A timely petition for a rehearing en banc was denied on July 23, 1975, and this petitioner's application for an extension of time was filed within ninety days of that date, namely, on October 20, 1975. This Honorable Court's jurisdiction is invoked under 28 USC § 1254(1), an interpretation of the Treaty of Point Elliott, 12 Stat. 927, being required.

QUESTION PRESENTED FOR REVIEW

Are the present day reefnetters operating in what were, at treaty times, "usual and accustomed grounds and stations" of the Lummis?

TREATIES AND STATUTES INVOLVED

Interpretation of the Treaty of Point Elliott, above referred to, is required and, for statutory justification for bringing this action, 28 USC § 1254(1) above quoted.

STATEMENT OF THE CASE

This action was originally initiated by the United States of America, acting through the United States District Attorney for the Western District of Washington, against the State of Washington. Subsequently, many In-

dian tribes intervened as additional plaintiffs and the directors of the Washington State Department of Fisheries and the Washington State Department of Game thereafter intervened as additional defendants. The Lummi complaint in intervention, (Vol. 1, p. 75), sought, in effect, to have the State barred from issuing further licenses for reefnetting and to ban reefnetting, as it has been conducted in Puget Sound since 1934, from the areas presently in use upon the grounds that these were locations granted irrevocably to the Lummi by the Treaty of Point Elliott. The reefnetters, through their Association, applied to participate as a defendant-intervener (Vol. 1, p. 193), which right was ultimately granted to them. (Judge Boldt originally denied the application but, upon a motion for reconsideration, Judge Goodwin granted the intervention.) (Vol. 1, p. 204).

Thereafter, an answer was filed upon behalf of the reefnetters, (Vol. 1, p. 207), and the various issues between the Lummis and the reefnetters were set forth in the Final Pretrial Order, (Vol. IV, p. 766).

In disposing of these issues, the trial court ruled completely in favor of the plaintiffs, including the Lummis, such rulings being encompassed in the Final Decision, Findings of Fact, and Conclusions of Law, (Vol. VII, pp. 1515-1727).

The basis for the jurisdiction of the trial court is the existence of the Treaty and Statute above cited.

It is submitted, pursuant to the requirements of Rule 19, that a Writ of Certiorari should issue from this Honorable Court because the Court of Appeals decided the question affecting these petitioners in a way in conflict

with the prior decisions of this Court in the two Puyallup cases, namely, *Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968) (Puyallup I) and *Department of Game v. Puyallup Tribe,* 414 U.S. 44 (1973) (Puyallup II), in the manner and fashion set forth in the Briefs of petitioners State of Washington and Northwest Steelheaders Council of Trout Unlimited. Furthermore, in deciding upon a strict formula for application of the Treaty of Point Elliott, and in holding that these petitioners were fishing upon the "usual and accustomed grounds and stations" of the Lummis at treaty times, the lower courts have decided an important question of federal law which has not been, but should be, settled by this court.

ARGUMENT

In order to determine what were the "usual and accustomed grounds and stations" for the taking of fish utilized by the Lummis at the time of the Treaty of Point Elliott, it is essential to determine how "reefnetting" was done by the Lummis at, and prior to, treaty times. At trial, the plaintiffs' principal anthropological witness, Dr. Barbara Lane, beginning at page 15 of USA Exhibit 30, described by quotes from Collins how reefnetting was done in 1888 and 1889. She continues the description by quoting, at page 17 of the said exhibit, from a manuscript written in 1951 by another anthropologist, Dr. Suttles. In it, Suttles notes that,

> "Usually the reefnet was located in a kelp-covered reef *a short distance offshore.* Often it was opposite a headland that caused a backward sweep of tidal current. The fish entered with the current. If the location were in kelp

> bed, a channel was cleared so that the fish swam into the channel and into the hidden net. If there were no kelp, the illusion of a channel was created by hanging weeds on lines leading to the net."

More contemporary descriptions of how reefnetting was done by the Lummis in earlier times appears in Reefnetters exhibits, RN 12, RN 13 and RN 14, all three of which are affidavits from Indians given in an early trial held in 1896 and 1897 in the Circuit Court of the United States, District of Washington, Northern Division, i.e., Seattle, wherein the United States, upon behalf of various Lummis sought to restrain the Alaska Packers Association and an adjoining land owner, Kate Waller, from installing fish-traps—then legal, but illegal in this state since 1934—where it interfered with the reefnet operations of the Lummis at Point Roberts at the northern part of Puget Sound.

RN 12 is the affidavit of a Lummi, Jack Sumptilino. On page 1 thereof, he states that he is more than 85 years old and that he had fished [i.e., reefnetted] at Point Roberts since he was so small and young that he could not recollect the first time he fished there. He specifically states,

> "We fished on the reef with nets made of young willow and for anchor ropes we used ropes made out of cedar withes and bark;"

RN 13 is the affidavit of one John Elwood—not a Lummi—who states, at page 1, that the salmon caught by the Lummis passed over and near Village Point reef on Lummi Island a distance of about two miles from the

Lummis' reservation, then to Point White Horn and thence to Point Roberts which is more than thirteen miles north of the reservation. He further adds,

> "That the only places in the course of the run of such salmon where they can be taken by hand nets such as are now and have been from time immemorial used by the Indians is on the reefs over which they cross and at such places on such reefs where the water is not to exceed *two fathoms* in depth; at Village Point and at Point Roberts are the only places in the waters of the lower Puget Sound or Gulf of Georgia where the Indians can catch them;"

RN 14 is the affidavit of Harry Sewalton, a Lummi, who states at the top of the fifth page of his affidavit,

> "'Affiant further says that the said Point Roberts reef and the reef at Village Point on Lummi Island in Whatcom County, are the only two reefs in the waters of said county or in the lower Sound upon which the said Lummi Indians could take salmon with hand or lift nets; that at Village Point the reef is very short and abrupt and it is possible for said Indians to use at most *but few nets upon such reef;*"

(All underlining in the preceding paragraphs has been done by this writer.)

Contemporary methods of reefnetting are set forth in the Transcript of the trial testimony of Jerry Anderson beginning at page 3685 through line 8, page 3695, (Vol.

XVI). A further description of the equipment used and the manner of operation appears in RN 1, the pretrial deposition of reefnetter, John R. Brown, from page 55 through page 69 thereof.

An accurate description of the depths needed for present day reefnetting operations appears in Exhibit RN 9, the direct testimony of Laurence G. Waters. Also in his trial testimony commencing at page 3729 of the Transcript and through page 3732, (Vol. XVI).

The location of the present day gears, and their appearance and operation, is set forth in Exhibit RN 7, which is an aerial map of Legoe Bay, the present principal reefnetting ground. Exhibit RN 8, an overlay, is also of assistance in showing the locations of the various rows and the depths.

We are then confronted with the question, how liberally may Indian treaties be interpreted?

There are various statements in cases such as *Jones v. Meehan,* 175 U.S. 1 (1899), and *United States v. Winans,* 198 U.S. 371, (1905), and *Missouri v. Holland,* 252 U.S. 416, (1920), that the treaties should always be liberally construed for the benefit of the Indians.

There have been other statements, however, from the United States Supreme Court and other Federal Courts putting limits to this rule. *Kansas or Kaw Tribe of Indians v. United States,* 80 Ct. Cl. 264, (1934), cert. denied, 296 U.S. 577; *Osage Tribe of Indians v. United States,* 66 Ct. Cl. 64, (1928), appeal dismissed and cert. denied; *Osage Indians v. United States,* 279 U.S. 811, all held that courts must accept the treaties as written and cannot alter or amend them.

In *Northwestern Shoshone Indians v. United States,* (1944) 324 U.S. 335, at p. 353, Justice Reed, writing the majority opinion, states,

> "We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress."

Justice Jackson concurring for himself and Justice Black, states, in the same case at p. 356, while addressing himself to the question of the liberal interpretation of Indian treaties,

> "Even if both parties to these agreements were of our own stock, [i.e., non-Indian], we being a record-keeping people, a court would still have the gravest difficulty determining what their motives and intensions and meanings were. *Statutes of limitation cut off most such inquiries, not because a claim becomes less just the longer it is denied, but because another policy intervenes—the policy to leave in repose matters which can no longer be the subject of intelligent adjudication."*
> (Emphasis supplied.)

In *Choctaw Nation of Indians v. United States,* (1942) 318 U.S. 423, at p. 431, Justice Murphy stated,

> "Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construc-

> tion adopted by the parties. *Factor v. Laubenheimer,* 290 U.S. 276, 294, 295, 78 L. Ed. 315, 324, 325, 54 S. Ct. 191; *Cook v. United States,* 288 U.S. 102, 112, 77 L. Ed. 641, 646, 53 S. Ct. 305. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the same sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' *Tulee v. Washington,* 315 U.S. 681, 684, 685, 86 L. Ed. 1115, 1119, 1120, 62 S. Ct. 862. See also *United States v. Shoshone Tribe,* 304 U.S. 111, 116, 82 L. Ed. 1213, 1218, 58 S. Ct. 794; *Choctaw Nation v. United States,* 119 U.S. 1, 28, 30 L. Ed. 306, 315, 7 S. Ct. 75. *But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Cf. United States v. Choctaw Nations,* 179 U.S. 494, 531, 533, 45 L. Ed. 291, 305, 306, 21 S. Ct. 149; *United States v. Mille Lac Band,* 229 U.S. 498, 500, 57 L. Ed. 1299, 1302, 33 S. Ct. 811." (Emphasis supplied.)

We must then abide by the plain, clear meaning of the key words already quoted above—"at all usual and accustomed grounds and stations" and "in common with all other citizens of the Territory."

Next we must consider what is the meaning to be given

the treaty words, "usual and accustomed fishing grounds and stations".

As the court points out in his Finding of Fact No. 24, beginning at p. 19 of the Findings of Fact, (Vol. VII, p. 1597) the meanings intended by the treaty commissioners were those appearing in the dictionaries then extant. Further, we are in full agreement with that portion of Finding No. 24 which appears at the top of p. 20 of the Findings of Fact that the words "usual and accustomed" were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental.

Let us requote then the meanings for the two words "usual" and "accustomed" as they appeared in the 1828 and 1862 editions of Webster's American Dictionary of the English Language set forth in the Finding:

> "usual — Customary; common; frequent, such as occurs in ordinary practice or in the ordinary course of events.
>
> accustomed: Being familiar by use; habituated; inured . . . usual; often practiced."

Applying the meanings, as thus established, to the question of whether or not the Reefnetters, as they presently are functioning, are invading Indian Treaty rights —which is the essence of the dispute between the Lummis and the Reefnetters—we cannot but conclude that in no wise are the areas of Legoe Bay now used for reefnetting either "accustomed" or "usual" "fishing grounds or stations" of the Lummis at Treaty times. The very prim-

itive equipment the Lummis were using at that time, plus the shallow depths and limited locations in which they were compelled to function, totally excludes any argument that reefnetting, as now conducted with several eight ton anchors per vessel, heavy steel cables, substantial depths, and strong tidal problems, is any wise upon "grounds or stations" utilized by the Lummis at Treaty times. In other words, a totally new and entirely different fishing ground has been developed by present day reefnetters in the operations as they are now carried on.

The foregoing conclusion is bolstered further by the last sentence in the court's Finding No. 24, to-wit,

> "The restrictive sense of the terms "usual and accustomed" could have been conveyed in Chinook Jargon."

The Indians, in other words, were intending only to convey an interest in what they were then presently enjoying, i.e., the use of "but few (See Exhibit RN 14, p. 5) locations at Village point (which is at the north end of Legoe Bay) and the others at Point Roberts—an area not in dispute in the present suit.

That present day reefnetters are in no wise utilizing areas used by the Lummis at Treaty times is reinforced further by much other of the testimony or exhibits:

(a) Dr. Barbara Lane concedes, in the Transcript of her testimony at p. 2156, ls. 12-15, (Vol. X, p. 2156), that she is unable to state whether the present reefnet locations are in locations which would have been used by the Lummi Indians.

(b) Exhibit RN 7 shows that the area now utilized

for present day reefnetting is large and extensive. Yet the affidavit of Harry Sewalton, Exhibit RN 14, in the first paragraph of p. 5, states,

> "At Village Point [which is at the northern end of Legoe Bay] the reef is very short and abrupt and it is possible for said Indians to use at most *but few* nets upon such reef;". (Underlining supplied.)

(c) The affidavit of John Elwood, Exhibit RN 13, from the same federal court action states, in speaking of the use by the Lummis of their nets,

> "[nets] such as are now and have been from time immemorial used by the Indians are on the reef over which they cross and at such places on such reefs *where the water is not to exceed two fathoms in depth.*" (Underlining supplied.)

(d) The affidavit of Jack Sumptilino, Exhibit RN 12, in referring to the material used for nets and anchor ropes states,

> "We fished on the reef with nets made of young willow and for anchor ropes we used ropes made out of cedar withes and bark;"

(e) Even Lummi witness, Herman Olsen, states at p. 2955 of the Transcript of his testimony, (Vol. XIII, p. 2955), that the cedar ropes were only twenty feet long. He repeats this statement on the succeeding page of his testimony, 2956.

(f) Such ropes were, therefore, not only far too short to have enabled them to fish at the depths shown in the testimony of Laurence G. Waters, (Vol. XVI, pp.

3729-3732), but they would not have had the strength of the three-quarter inch steel cables nor the one and one-eighth inch synthetic lines now used for anchor lines., Tr. pp. 3699, 3700, (Vol. XVI, pp. 3699-3700). They could not have sustained thirty-two tons of anchors such as are now used in front, (1. 2, p. 3704, Vol. XVI). Four experienced reefnetters, Jerry Anderson, Warren C. Granger, John R. Brown and Glenn Schuler, stated positively and unequivocably, (Vol. XVI, pp. 3695, 3698; Vol. XVI, p. 3739; Vol. XVI, p. 3763; Vol. XVI, pp. 3768, 3769), that in their opinions pre-Treaty reefnet boats owned by the Lummis could not possibly have fished in the areas now used with the lines and anchors then available because of the extreme tidal conditions which sometimes prevail and the depths in which the operations are conducted.

Obviously and unquestionably, therefore, in view of the foregoing points, present day reefnetting is being conducted in an area which would never have been capable of use by pre-Treaty Lummis and which is not, therefore, within an area which may ever have been a "usual or accustomed ground or station". Present day reefnetters are clearly operating outside the area referred to, and included in, the provisions of the Treaty; the Treaty does not apply to them nor should it be the basis for restricting their activities as they have been conducted in the past under state sanction and control.

CONCLUSION

Present day reefnetters are in no wise operating upon the "usual and accustomed grounds and stations" of the Lummis as the latter existed when the Treaty of Point Elliott was negotiated. The primitive fishing equipment

available to the Lummis at the time of the treaty negotiations were wholly incapable of fishing in the grounds now used by the present day reefnetters. The latter are but utilizing—and wholly without discrimination in any way toward the Lummis—a new fishing area developed by them in recent decades, which location is situated wholly outside of any marine area used by pre-treaty Indians.

Respectfully submitted,

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